

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

AVRAM VINETO NIKA,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:09-cv-0178-JCM-RAM

**ORDER**

In this capital habeas corpus action, there is, before the court, a motion for stay and abeyance (docket #42) filed by the petitioner. Also before the court is respondents' motion to dismiss (docket #41). Briefing on the motion to dismiss has been suspended pending the resolution of the motion for stay and abeyance.

This habeas corpus action is brought pursuant to 28 U.S.C. § 2254, by Avram Vineto Nika, a Nevada prisoner sentenced to death. Nika's conviction and death sentence result from the August 26, 1994, murder of Edward Smith near a highway about 20 miles east of Reno. Smith apparently stopped to help Nika, who was stranded with a broken down car; Smith was killed by a gunshot to the forehead, and his car was stolen.

Following his conviction, Nika unsuccessfully appealed to the Nevada Supreme Court. The Nevada Supreme Court's opinion on Nika's direct appeal is published as *Nika v. State*, 113 Nev.

1 1424, 951 P.2d 1047 (1997). Nika then unsuccessfully pursued a state-court habeas corpus petition.  
2 *See Nika v. State*, 124 Nev. ----, 198 P.3d 839 (2008).

3 Nika initiated this federal habeas corpus action on April 7, 2009, and counsel was appointed.  
4 On March 1, 2010, Nika filed an amended petition for writ of habeas corpus (docket #18). On  
5 April 30, 2010, respondents filed their motion to dismiss (docket #41). On May 28, 2010, Nika filed  
6 his motion for stay and abeyance (docket #42). In that motion, Nika argues that the court should stay  
7 this case pending his exhaustion of claims in state court.

8 On April 20, 2010, Nika filed, in state court, a petition for a writ of habeas corpus. *See*  
9 Motion for Stay and Abeyance, p. 2. Nika requests that this federal case be stayed pending the  
10 conclusion of the state-court habeas litigation.

11 A federal court may not grant habeas corpus relief on a claim not exhausted in state court. 28  
12 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity,  
13 and is intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*  
14 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the  
15 claim to the highest state court, and must give that court the opportunity to address and resolve it.  
16 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*,  
17 504 U.S. 1, 10 (1992).

18 Nika and the respondents agree that the amended petition in this action is a mixed petition –  
19 meaning that it contains both exhausted and unexhausted claims. *See* Motion for Stay and  
20 Abeyance, p. 2; Opposition to Motion for Stay and Abeyance, p. 3; *see also* Motion to Dismiss  
21 (docket #41).

22  
23 If Nika's mixed amended petition is dismissed without prejudice, he may face limitations  
24 issues when he attempts to file a new federal petition after exhausting his claims in state court; this is  
25 because of the well-settled rule that the pendency of a federal habeas petition does not result in  
26 statutory tolling of the applicable one-year limitations period. *See* 28 U.S.C. § 2244(d) (one year

1 limitations period); *Duncan v. Walker*, 533 U.S. 167 (2001) (pendency of federal habeas petition  
 2 does not toll limitations period); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (regarding  
 3 “protective petitions”). If this case were simply dismissed at this point, then the statute of limitations  
 4 might bar petitioner from filing a new federal habeas petition.

5 In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court circumscribed the  
 6 discretion of the federal district courts to impose stays to facilitate habeas petitioners’ exhaustion of  
 7 claims in state court. The *Rhines* Court stated:

8 [S]tay and abeyance should be available only in limited circumstances. Because  
 9 granting a stay effectively excuses a petitioner’s failure to present his claims first to  
 10 the state courts, stay and abeyance is only appropriate when the district court  
 11 determines there was good cause for the petitioner’s failure to exhaust his claims first  
 12 in state court. Moreover, even if a petitioner had good cause for that failure, the  
 13 district court would abuse its discretion if it were to grant him a stay when his  
 14 unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) (“An application  
 15 for a writ of habeas corpus may be denied on the merits, notwithstanding the failure  
 16 of the applicant to exhaust the remedies available in the courts of the State”).

13 \* \* \*

14 [I]t likely would be an abuse of discretion for a district court to deny a stay and to  
 15 dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his  
 16 unexhausted claims are potentially meritorious, and there is no indication that the  
 17 petitioner engaged in intentionally dilatory litigation tactics. In such circumstances,  
 18 the district court should stay, rather than dismiss, the mixed petition.

17 *Rhines*, 544 U.S. at 277-78.

18 Nika argues that he can show good cause for not previously exhausting his claim of  
 19 ineffective assistance of trial counsel in state court (Ground 1 of the amended petition) because of  
 20 ineffective assistance of his former state-court post-conviction counsel. *See* Motion for Stay and  
 21 Abeyance, pp. 5-10. Further, Nika argues that he can show good cause for not previously exhausting  
 22 his claim that the prosecution failed to disclose material evidence, (Ground 4 of the amended  
 23 petition) because the State failed to disclose the evidence and because of his recent discovery of  
 24 certain of the evidence. *Id.* at pp. 10-12.

25 The respondents “do not contest Nika’s ability to show ‘good cause’ and ‘potential merit’  
 26 sufficient to justify an order from this court to allow him to exhaust previously unrepresented claims.”

1 Opposition to Motion for Stay and Abeyance, p. 2. In fact, the respondents “do not oppose Nika’s  
2 request for a stay and abeyance....” *Id.* at 6.

3 However, respondents “do oppose a stay to allow Nika to needlessly re-litigate previously  
4 resolved claims.” *Id.* Respondents argue that “Nika cannot show ‘good cause’ nor ‘potential merit’  
5 to justify his re-assertion in the Nevada state courts of previously exhausted claims that are  
6 *res judicata.*” *Id.* at 2. Respondents “request this Court to issue its decision determining which  
7 claims are exhausted and which claims are unexhausted, and then condition any stay and abeyance  
8 upon Nika limiting the issues presented to the Nevada state courts to the previously unrepresented  
9 federal claims contained in his amended federal petition.” *Id.* at 6.

10 *Rhines* does not state, or even suggest, that the court should conduct a claim by claim  
11 analysis of the entire federal petition to determine which claims qualify for a stay and which do not.  
12 The efficient approach is for the court to address the petitioner’s motion for stay and abeyance to  
13 determine if a stay is warranted with respect to any claim. If a stay is warranted with respect to any  
14 claim, the case should be stayed pending the conclusion of the state-court proceedings, and the court  
15 need not conduct a claim-by-claim analysis regarding the remaining claims. Here, respondents  
16 concede that a stay is warranted. The court need not expend time and resources to determine which  
17 of Nika’s claims meet the *Rhines* standard and which do not.

18 Furthermore, as a matter of comity, it is not for this court to determine which claims may,  
19 and which claims may not, be asserted in Nika’s state-court habeas action. That is for the state  
20 courts to determine. This court will not interfere with the state courts’ jurisdiction, and this court  
21 will not presume to control the joinder of claims in an action before the state courts.

22 There is no indication in the record that Nika has engaged in intentionally dilatory litigation  
23 tactics.

24 The court will, therefore, grant Nika’s motion for stay and abeyance, and stay this action.  
25 The court will not place any limitation on the claims Nika may present in the state-court litigation.

26 The court’s intention is that this will be the last time that the court imposes a stay to facilitate

1 Nika's exhaustion of claims in state court. Nika must exhaust *all* of his unexhausted claims in state  
2 court during the stay of this action imposed pursuant to this order.

3 **IT IS THEREFORE ORDERED** that petitioner's Motion for Stay and Abeyance  
4 (docket #42) is **GRANTED**. This action is **STAYED** to allow petitioner to exhaust, in state court,  
5 all his unexhausted claims for habeas corpus relief.

6 **IT IS FURTHER ORDERED** that respondents' Motion to Dismiss (docket #41) is  
7 **DENIED** as moot.

8 **IT IS FURTHER ORDERED** that, on or before **December 15, 2010**, petitioner shall file  
9 and serve a status report, describing the status of his state-court proceedings. Thereafter, during  
10 the stay of this action, petitioner shall file such a status report every 6 months (on or before  
11 June 15, 2011; December 15, 2011; June 15, 2012; etc.). Respondents may, if necessary,  
12 file and serve a response to any such status report within 15 days after its service. If necessary,  
13 petitioner may reply within 15 days of service of the response.

14 **IT IS FURTHER ORDERED** that following the conclusion of petitioner's state court  
15 proceedings, petitioner shall, within **30 days**, make a motion to lift the stay.

16 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a motion by  
17 respondents if petitioner does not comply with the time limits in this order, or if he otherwise fails to  
18 proceed with diligence during the stay imposed pursuant to this order.

19 **IT IS FURTHER ORDERED** that, absent extraordinary circumstances, this will be the final  
20 opportunity that this court provides to petitioner to return to state court to exhaust claims for habeas  
21 corpus relief.

22 Dated this 27th day of August, 2010.

23  
24  
25   
26 UNITED STATES DISTRICT JUDGE